IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

WARKIETHA COLLINS	:	APPEAL NO. C-100620 TRIAL NO. A-0904744
and	:	
DEMARCUS COLLINS,	:	JUDGMENT ENTRY.
Plaintiffs-Appellants,	:	
vs.	:	
JOHN/JANE DOE EMPLOYEE,	:	
Defendant,	:	
and	:	
THE KROGER COMPANY,	:	
SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,	:	
and	:	
MEDICAID,	:	
Defendants-Appellees.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.[1]

Plaintiffs-appellants Warkietha and Demarcus Collins appeal from a decision of the Hamilton County Court of Common Pleas, granting summary judgment in favor of defendant-appellee Kroger Company and dismissing all of the Collinses'

[1] See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 11.1.1.

claims. We find no merit in their two assignments of error, and we affirm the trial court's judgment.

The record shows that Warkietha, along with her daughter and her cousin, went to shop at a Kroger store in the early evening. It was still light outside as the sun had just started to set. Warkietha and her companions got out of the car and walked toward the nearest entrance. She noticed that there was "water everywhere." The water came from Kroger employees who were watering the plants and flowers outside the store. Warkietha said that no other entrance to the store would have allowed her to avoid the water.

Before walking through the water, Warkietha warned her daughter to be careful because she was wearing slippery shoes. As Warkietha was walking up the ramp into the store, she slipped on the wet pavement and fell, injuring herself.

Kroger filed a motion for summary judgment, in which it argued that the water was an open-and-obvious hazard. The trial court journalized an entry granting Kroger's motion, dismissing all the Collinses' claims, and stating that there was "no just reason for delay." This appeal followed.

In their first assignment of error, the Collinses state that the trial court erred in granting Kroger's motion for summary judgment. They argue that material issues of fact exist for trial as to whether Kroger owed Warkietha a duty since it had created the hazardous condition. This assignment of error is not well taken.

The open-and-obvious doctrine still applies in Ohio.[2] It relates to the threshold issue of duty. Whether a duty exists is generally a question of law, although the issue of whether a hazardous condition is open and obvious may present genuine issues of fact for

[2] *Armstrong v. Best Buy Co., Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, syllabus.

the jury to decide.[3] "Where the hazardous condition is not hidden from view or concealed and is discoverable by ordinary inspection, the court may properly sustain a summary judgment motion against the claimant."[4]

Under this doctrine, property owners have no duty to warn a business invitee of hazardous conditions that are open and obvious.[5] The rationale underlying this rule is that the open-and-obvious nature of the hazard serves as a warning. The property owner may reasonably expect that persons entering the premises will discover those dangers and take appropriate measures to protect themselves.[6]

By her own admission, Warkietha saw and appreciated the hazard posed by the water. She even warned her daughter to be careful. Further, no attendant circumstances existed that distracted her from the hazard posed by the water, reduced the degree of care that an ordinary person would have exercised at the time, or significantly enhanced the danger of the defect.[7] Because the hazard was open and obvious, Kroger had no duty to warn Warkietha about the hazardous condition.

Warkietha argues that the open and obvious doctrine is not dispositive because Kroger created the hazardous condition. She relies on *Simmers v. Bentley Constr. Co.*[8] for the proposition that the doctrines of contributory negligence and assumption of the risk can still apply in cases involving an open-and-obvious danger.

In *Simmers*, the Ohio Supreme Court declined to apply the open-and-obvious doctrine where the defendant had created an unreasonably hazardous condition.[9] But

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[3] *Townsend v. Dollar Gen. Corp.*, 6th Dist. No. E-09-067, 2010-Ohio-6523, ¶10; *Jackson v. Bd. of Pike Cty. Commrs.*, 4th Dist. No. 10CA805, 2010-Ohio-4875, ¶20.
[4] *Martin v. Christ Hosp.*, 1st Dist. No. C-060639, 2007-Ohio-2795, ¶21, quoting *Parsons v. Lawson Co.* (1989), 57 Ohio App.3d 49, 50-51, 566 N.E.2d 698.
[5] *Armstrong*, supra, at syllabus; *Martin*, supra, at ¶15.
[6] *Armstrong*, supra, at ¶5; *Martin*, supra, at ¶15.
[7] *Frano v. Red Robin Internatl., Inc.*, 181 Ohio App.3d 13, 2009-Ohio-685, 907 N.E.2d 796, ¶22; *Briel v. Dollar Gen. Store*, 11th Dist. No. 2007-A-0016, 2007-Ohio-6164, ¶38; *McGuire v. Sears, Roebuck & Co.* (1996), 118 Ohio App.3d 494, 498-499, 693 N.E.2d 807.
[8] 64 Ohio St.3d 642, 1992-Ohio-42, 597 N.E.2d 504.
[9] Id. at 644.

that case did not involve premises liability, and the supreme court carefully distinguished it on that basis.

The court stated that the open-and-obvious doctrine "governs a landowner's duty to persons entering the property—property over which the landowner has the right and a power to admit or exclude persons as invitees, licensees, or trespassers."[10] It declined to apply the open-and-obvious doctrine to an independent contractor who did not have a property interest in the premises, stating that the case did not put the doctrine at issue and that it would apply ordinary negligence principles.[11] Consequently, we do not find *Simmers* to be dispositive.

We find no issues of material fact. Construing the evidence most strongly in the Collinses' favor, we hold that reasonable minds could reach but one conclusion—that the defect was open and obvious and Kroger had no duty to warn Warkietha about the danger. Kroger was entitled to judgment as a matter of law. Consequently, the trial court did not err in granting Kroger's motion for summary judgment.[12] We overrule the Collinses' first assignment of error.

In their second assignment of error, the Collinses contend that the trial court erred in granting Kroger's motion for summary judgment. They argue that Kroger presented no evidence showing that Warkietha had failed to exercise ordinary care for her own safety. This argument relates to the concepts of contributory and comparative negligence.[13] The open-and-obvious doctrine is a complete defense to a negligence claim against a property owner.[14] Because the hazard was open and obvious, issues involving contributory or

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[10] Id. at 645.
[11] Id. at 644-645; *Vonderhaar v. Cincinnati*, 1st Dist. No. C-100146, 2010-Ohio-6289, ¶23-26; *Lumley v. Glassman, Inc.*, 11th Dist. No. 2007-F-0082, 2009-Ohio-540, ¶30.
[12] See *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267; *Greene v. Whiteside*, 181 Ohio App.3d 253, 2009-Ohio-741, 908 N.E.2d 975, ¶23; *Stinespring v. Natorp Garden Stores* (1998), 127 Ohio App.3d 213, 215, 711 N.E.2d 1104.
[13] See *Simmers*, supra, at 646; *Nunez v. J.L. Sims Co., Inc.*, 1st Dist. No. C-020599, ¶20-21,
[14] *Jung v. Davies*, 2nd Dist. No. 24046, 2011-Ohio-1134, ¶44; *Vonderhaar*, supra, at ¶26.

comparative negligence are irrelevant. Consequently, we overrule the Collinses' second assignment of error and affirm the trial court's judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

DINKELACKER, P.J., HILDEBRANDT and **FISCHER, JJ.**

To the Clerk:

Enter upon the Journal of the Court on June 15, 2011

per order of the Court _____.

Presiding Judge